

## Request for Reconsideration after Final Action

The table below presents the data as entered.

Input Field	Entered
<b>SERIAL NUMBER</b>	86357904
<b>LAW OFFICE ASSIGNED</b>	LAW OFFICE 115
<b>MARK SECTION (current)</b>	
<b>MARK FILE NAME</b>	http://tmng-al.uspto.gov/resting2/api/img/86357904/large
<b>STANDARD CHARACTERS</b>	NO
<b>USPTO-GENERATED IMAGE</b>	NO
<b>COLOR(S) CLAIMED (If applicable)</b>	Color is not claimed as a feature of the mark.
<b>DESCRIPTION OF THE MARK (and Color Location, if applicable)</b>	The mark consists of the configuration of a firearm sight with the following features: a generally "L-shaped" configuration of a firearm sight with the vertical portion of the "L" facing toward the eye of the user and an asymmetrical from front to back housing over the sight opening. The claimed features are shown in solid lines and the portions that are in dotted lines are not claimed as features of the mark.
<b>MARK SECTION (proposed)</b>	
<b>MARK FILE NAME</b>	<a href="#">\\TICRS\EXPORT16\IMAGEOUT 16\863\579\86357904\xml12 \RFR0002.JPG</a>
<b>STANDARD CHARACTERS</b>	NO
<b>USPTO-GENERATED IMAGE</b>	NO
<b>COLOR MARK</b>	NO
<b>DESCRIPTION OF THE MARK (and Color Location, if applicable)</b>	The mark consists of a generally L-shaped configuration of a firearm sight with the vertical portion of the "L" facing toward the eye of the user and an asymmetrical from front to back housing over the sight opening. The broken lines depicting the viewing window, screws and screw openings indicate placement of the mark on the goods and do not form part of the mark.
<b>PIXEL COUNT ACCEPTABLE</b>	YES
<b>PIXEL COUNT</b>	577 x 481
<b>ARGUMENT(S)</b>	
<p>This document is filed in response to the Final Office Action mailed 2/2/16. The Examining Attorney maintains that 1) the drawing is not acceptable because it includes functional elements depicted in solid lines rather than broken or dotted lines, and 2) Applicant's claim of acquired distinctiveness is insufficient.</p> <p>Applicant respectfully requests withdrawal of the refusals for the reasons set forth below.</p> <p><b><u>FUNCTIONAL MATTER - DRAWING AND MARK DESCRIPTION</u></b></p> <p>The Examining Attorney claims that the drawing of Applicant's mark is not acceptable because it contains functional elements depicted in solid lines rather than broken lines.</p> <p>The Examining Attorney states that the following additional elements are functional: the flat base and viewing window/sight opening. Applicant respectfully disagrees regarding the base, which does not serve a functional purpose, and remains as a solid line in Applicant's prior registrations for its firearm sight designs, including Registration Nos. 3906327, 3906328 and 4550410 on the Principal Register.</p>	

However, Applicant submits herewith an amended drawing clearly showing the sight opening in dotted lines (the outer portion of the opening was previously shown in dotted lines), and submits the following disclaimer:

#### THE RECTANGULAR FRONT OF THE SIGHT OPENING IMMEDIATELY SURROUNDING THE LENS

The identical disclaimer was submitted in each of Applicant's prior registrations for its firearm sight designs, including Registration Nos. 3906327, 3906328 and 4550410 on the Principal Register.

Regarding the description of the mark, Applicant amended the description with its previous response, as requested. However, the Examiner requires further revision to the description, likely to conform with the amended drawing. Applicant therefore amends the description as follows:

*The mark consists of a generally L-shaped configuration of a firearm sight with the vertical portion of the "L" facing toward the eye of the user and an asymmetrical front to back housing over the sight opening. The broken lines depicting the viewing window, screws and screw openings indicate placement of the mark on the goods and do not form part of the mark.*

#### **NONDISTINCTIVE CONFIGURATION REFUSAL – ACQUIRED DISTINCTIVENESS**

The Examining Attorney maintains the refusal to accept the claim of acquired distinctiveness, stating that more evidence is required. As further evidence of acquired distinctiveness, Applicant submits:

- a. The Applicant has used the applied-for three dimensional trademark continuously and without interruption beginning no later than June 2009. (Vasilevski decl. ¶2.)
- b. The L-shaped configuration and design of the applied-for mark was chosen to be unique and distinctive from conventional firearm sight designs and to be readily identifiable as to its source. (Vasilevski decl. ¶3.)
- c. Applicant has expended over \$1.8 million in promoting its unique L-shaped firearm sights. (Vasilevski decl. ¶7.)
- d. Applicant's website prominently displays the trade dress and unique design of the applied-for mark and has averaged over 1.5 million hits per year. (Vasilevski decl. ¶8.)
- e. Applicant attends approximately 50 trade shows per year which have prominently displayed the unique design of the applied-for mark. (Vasilevski decl. ¶10.)
- f. Applicant has over 650 distributors for its firearm sights. (Vasilevski decl. ¶11.)
- g. Applicant has sold more than 1.1 million of its unique L-shaped firearm sights. (Vasilevski decl. ¶12.)
- h. Competing manufacturers have attempted to pass off their products as Applicant's products by slavishly copying the trade dress of the applied-for mark in a blatant attempt to deceive purchasers into believing the counterfeit and clone products are the products of Applicant. (Vasilevski decl. ¶9.)

Applicant also submits a claim of ownership of U.S. Trademark Registration Nos. 3906327, 3906328 and 4550410 on the Principal Register for related distinctive L-Shaped Gun Sights. Ownership of one or more prior registrations on the Principal Register of the same mark may be accepted as prima facie evidence of distinctiveness. 37 C.F.R. 2.42(b). Although Registration Nos. 3906327, 3906328 and 4550410 are not identical to the subject application, these registrations are clearly in the same family of marks as the applied for mark. The consuming public recognizes the unique L-Shaped Gun Sight family of marks as an indicator of source. Given that the Trademark Office agrees that Registration Nos. 3906327, 3906328 and 4550410 have acquired distinctiveness, the mark in the subject application is likewise suitable for registration on the Principal Register.

In the alternative, if the Examining Attorney maintains the refusal to accept the claim of acquired distinctiveness, despite the evidence submitted over the course of this examination, length of use in commerce (now more than 7 years), and claim of ownership of prior registrations on the Principal Register, then, subject to objections, the Applicant amends to the Supplemental Register.

In view of the submitted evidence of acquired distinctiveness, and in view of Applicant's claim of ownership of other registrations for L-Shaped Gun Sights, Applicant respectfully requests that the Examining Attorney reconsider and withdraw the refusal to register.

If there are any questions, please contact the undersigned attorney.

#### **EVIDENCE SECTION**

EVIDENCE FILE NAME(S)	
ORIGINAL PDF FILE	<a href="#">evi_7420424216-20160802201931423067_.2016_Vasilevski_Declaration_XPS2.pdf</a>
CONVERTED PDF FILE(S) (4 pages)	<a href="#">\\TICRS\EXPORT16\IMAGEOUT16\863\579\86357904\xml12\RFR0003.JPG</a>
	<a href="#">\\TICRS\EXPORT16\IMAGEOUT16\863\579\86357904\xml12\RFR0004.JPG</a>
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	<a href="#">\\TICRS\EXPORT16\IMAGEOUT16\863\579\86357904\xml12\RFR0006.JPG</a>
<b>DESCRIPTION OF EVIDENCE FILE</b>	Vasilevski Declaration
<b>ADDITIONAL STATEMENTS SECTION</b>	
<b>DISCLAIMER</b>	No claim is made to the exclusive right to use THE RECTANGULAR FRONT OF THE SIGHT OPENING IMMEDIATELY SURROUNDING THE LENS apart from the mark as shown.
<b>ACTIVE PRIOR REGISTRATION(S)</b>	The applicant claims ownership of active prior U.S. Registration Number(s) 3906327, 3906328, and 4550410.
<b>SIGNATURE SECTION</b>	
<b>RESPONSE SIGNATURE</b>	/hope v shovein/
<b>SIGNATORY'S NAME</b>	Hope V. Shovein
<b>SIGNATORY'S POSITION</b>	Attorney of record, Michigan bar member
<b>SIGNATORY'S PHONE NUMBER</b>	248-358-4400
<b>DATE SIGNED</b>	08/02/2016
<b>AUTHORIZED SIGNATORY</b>	YES
<b>CONCURRENT APPEAL NOTICE FILED</b>	YES
<b>FILING INFORMATION SECTION</b>	
<b>SUBMIT DATE</b>	Tue Aug 02 20:25:24 EDT 2016
<b>TEAS STAMP</b>	USPTO/RFR-XX.XXX.XX.XXX-2 0160802202524038919-86357 904-550e4acb5dd131329b242 14bcf9e743a12ef037d0482d9 2a6715bb579bb16e4cd-N/A-N /A-20160802201931423067

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PTO Form 1960 (Rev 10/2011)  
OMB No. 0651-0050 (Exp 07/31/2017)

## Request for Reconsideration after Final Action

### To the Commissioner for Trademarks:

Application serial no. **86357904** (Stylized and/or with Design, see <http://tmng-al.uspto.gov/resting2/api/img/86357904/large>) has been amended as follows:

#### MARK

**Applicant proposes to amend the mark as follows:**

**Current:** (Stylized and/or with Design, see <http://tmng-al.uspto.gov/resting2/api/img/86357904/large>)

**Proposed:** (Stylized and/or with Design, see [mark](#))

The applicant is not claiming color as a feature of the mark.

The mark consists of a generally L-shaped configuration of a firearm sight with the vertical portion of the "L" facing toward the eye of the user and an asymmetrical from front to back housing over the sight opening. The broken lines depicting the viewing window, screws and screw openings indicate placement of the mark on the goods and do not form part of the mark.

#### ARGUMENT(S)

**In response to the substantive refusal(s), please note the following:**

This document is filed in response to the Final Office Action mailed 2/2/16. The Examining Attorney maintains that 1) the drawing is not

acceptable because it includes functional elements depicted in solid lines rather than broken or dotted lines, and 2) Applicant's claim of acquired distinctiveness is insufficient.

Applicant respectfully requests withdrawal of the refusals for the reasons set forth below.

#### **FUNCTIONAL MATTER - DRAWING AND MARK DESCRIPTION**

The Examining Attorney claims that the drawing of Applicant's mark is not acceptable because it contains functional elements depicted in solid lines rather than broken lines.

The Examining Attorney states that the following additional elements are functional: the flat base and viewing window/sight opening. Applicant respectfully disagrees regarding the base, which does not serve a functional purpose, and remains as a solid line in Applicant's prior registrations for its firearm sight designs, including Registration Nos. 3906327, 3906328 and 4550410 on the Principal Register.

However, Applicant submits herewith an amended drawing clearly showing the sight opening in dotted lines (the outer portion of the opening was previously shown in dotted lines), and submits the following disclaimer:

#### **THE RECTANGULAR FRONT OF THE SIGHT OPENING IMMEDIATELY SURROUNDING THE LENS**

The identical disclaimer was submitted in each of Applicant's prior registrations for its firearm sight designs, including Registration Nos. 3906327, 3906328 and 4550410 on the Principal Register.

Regarding the description of the mark, Applicant amended the description with its previous response, as requested. However, the Examiner requires further revision to the description, likely to conform with the amended drawing. Applicant therefore amends the description as follows:

*The mark consists of a generally L-shaped configuration of a firearm sight with the vertical portion of the "L" facing toward the eye of the user and an asymmetrical from front to back housing over the sight opening. The broken lines depicting the viewing window, screws and screw openings indicate placement of the mark on the goods and do not form part of the mark.*

#### **NONDISTINCTIVE CONFIGURATION REFUSAL – ACQUIRED DISTINCTIVENESS**

The Examining Attorney maintains the refusal to accept the claim of acquired distinctiveness, stating that more evidence is required. As further evidence of acquired distinctiveness, Applicant submits:

- a. The Applicant has used the applied-for three dimensional trademark continuously and without interruption beginning no later than June 2009. (Vasilevski decl. ¶2.)
- b. The L-shaped configuration and design of the applied-for mark was chosen to be unique and distinctive from conventional firearm sight designs and to be readily identifiable as to its source. (Vasilevski decl. ¶3.)
- c. Applicant has expended over \$1.8 million in promoting its unique L-shaped firearm sights. (Vasilevski decl. ¶7.)
- d. Applicant's website prominently displays the trade dress and unique design of the applied-for mark and has averaged over 1.5 million hits per year. (Vasilevski decl. ¶8.)
- e. Applicant attends approximately 50 trade shows per year which have prominently displayed the unique design of the applied-for mark. (Vasilevski decl. ¶10.)
- f. Applicant has over 650 distributors for its firearm sights. (Vasilevski decl. ¶11.)
- g. Applicant has sold more than 1.1 million of its unique L-shaped firearm sights. (Vasilevski decl. ¶12.)
- h. Competing manufacturers have attempted to pass off their products as Applicant's products by slavishly copying the trade dress of the applied-for mark in a blatant attempt to deceive purchasers into believing the counterfeit and clone products are the products of Applicant. (Vasilevski decl. ¶9.)

Applicant also submits a claim of ownership of U.S. Trademark Registration Nos. 3906327, 3906328 and 4550410 on the Principal Register for related distinctive L-Shaped Gun Sights. Ownership of one or more prior registrations on the Principal Register of the same mark may be accepted as prima facie evidence of distinctiveness. 37 C.F.R. 2.42(b). Although Registration Nos. 3906327, 3906328 and 4550410 are not identical to the subject application, these registrations are clearly in the same family of marks as the applied for mark. The consuming public recognizes the unique L-Shaped Gun Sight family of marks as an indicator of source. Given that the Trademark Office agrees that Registration Nos. 3906327, 3906328 and 4550410 have acquired distinctiveness, the mark in the subject application is likewise suitable for registration on the Principal Register.

In the alternative, if the Examining Attorney maintains the refusal to accept the claim of acquired distinctiveness, despite the evidence submitted over the course of this examination, length of use in commerce (now more than 7 years), and claim of ownership of prior registrations on the Principal Register, then, subject to objections, the Applicant amends to the Supplemental Register.

In view of the submitted evidence of acquired distinctiveness, and in view of Applicant's claim of ownership of other registrations for L-Shaped Gun Sights, Applicant respectfully requests that the Examining Attorney reconsider and withdraw the refusal to register.

If there are any questions, please contact the undersigned attorney.

**EVIDENCE**

Evidence in the nature of Vasilevski Declaration has been attached.

**Original PDF file:**

[evi\\_7420424216-20160802201931423067\\_.2016\\_Vasilevski\\_Declaration\\_XPS2.pdf](#)

**Converted PDF file(s) ( 4 pages)**

[Evidence-1](#)

[Evidence-2](#)

[Evidence-3](#)

[Evidence-4](#)

**ADDITIONAL STATEMENTS**

**Disclaimer**

No claim is made to the exclusive right to use THE RECTANGULAR FRONT OF THE SIGHT OPENING IMMEDIATELY SURROUNDING THE LENS apart from the mark as shown.

**Claim of Active Prior Registration(s)**

The applicant claims ownership of active prior U.S. Registration Number(s) 3906327, 3906328, and 4550410.

**SIGNATURE(S)**

**Request for Reconsideration Signature**

Signature: /hope v shovein/ Date: 08/02/2016

Signatory's Name: Hope V. Shovein

Signatory's Position: Attorney of record, Michigan bar member

Signatory's Phone Number: 248-358-4400

The signatory has confirmed that he/she is an attorney who is a member in good standing of the bar of the highest court of a U.S. state, which includes the District of Columbia, Puerto Rico, and other federal territories and possessions; and he/she is currently the owner's/holder's attorney or an associate thereof; and to the best of his/her knowledge, if prior to his/her appointment another U.S. attorney or a Canadian attorney/agent not currently associated with his/her company/firm previously represented the owner/holder in this matter: (1) the owner/holder has filed or is concurrently filing a signed revocation of or substitute power of attorney with the USPTO; (2) the USPTO has granted the request of the prior representative to withdraw; (3) the owner/holder has filed a power of attorney appointing him/her in this matter; or (4) the owner's/holder's appointed U.S. attorney or Canadian attorney/agent has filed a power of attorney appointing him/her as an associate attorney in this matter.

The applicant is filing a Notice of Appeal in conjunction with this Request for Reconsideration.

Serial Number: 86357904

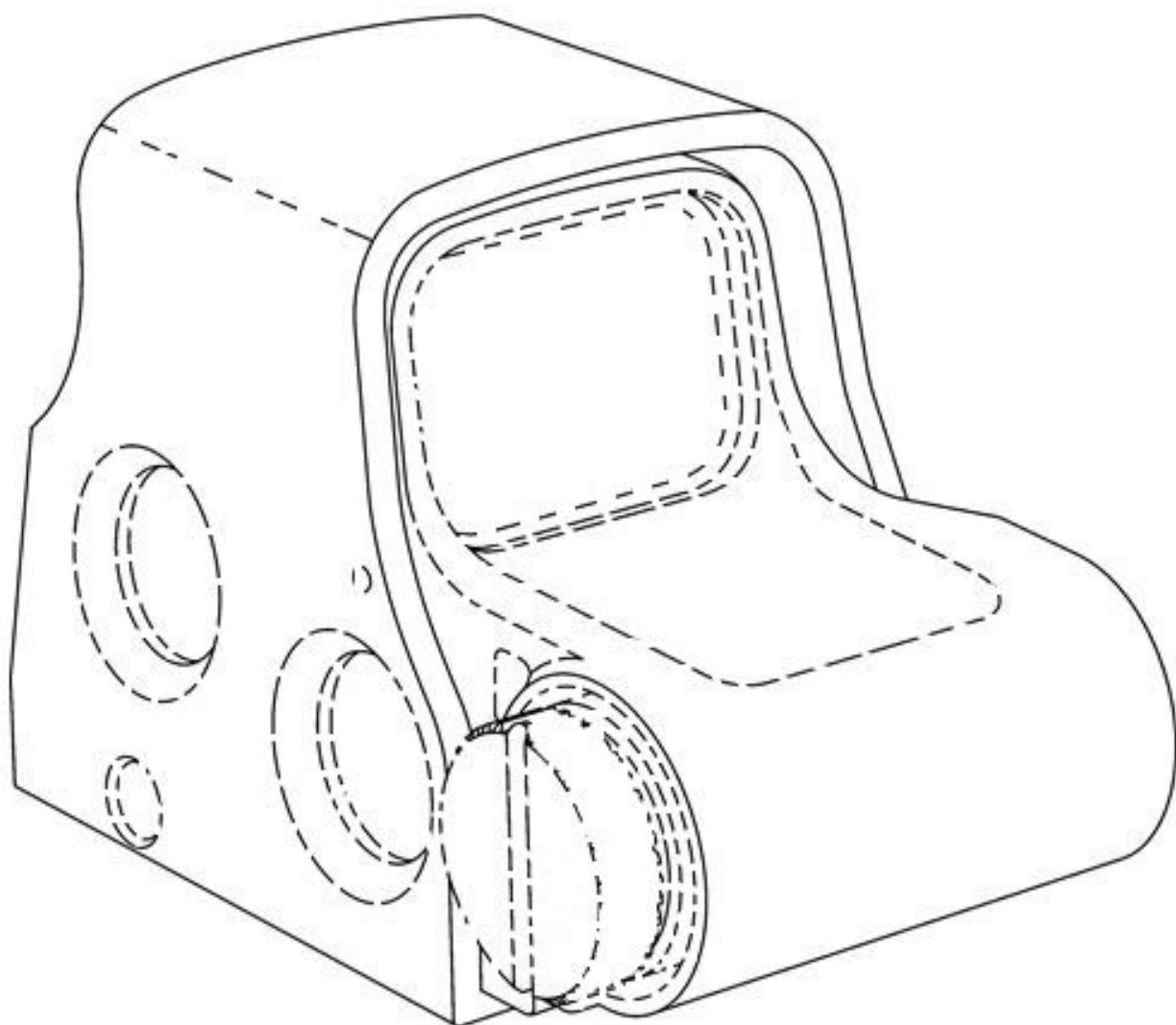
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TEAS Stamp: USPTO/RFR-XX.XXX.XX.XXX-2016080220252403

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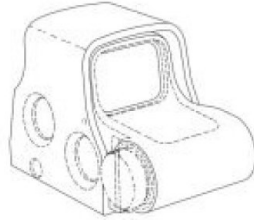
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N/A-N/A-20160802201931423067



**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**

Applicant: L-3 Communications Corporation  
Serial No.: 86/357904 for XPS2 Trade Dress (EOT0495TUS)



Examining Atty: Tracy L. Fletcher  
Law Office 115

**DECLARATION OF MELISSA VASILEVSKI**

I, Melissa Vasilevski, declare as follows under penalty of perjury.

1. I am Director of Contracts of L-3 Communications, the Applicant in the above-identified application for trademark registration. I have been employed by Applicant since April 2007.

2. The present application for registration on the principal register is for the unique and distinctive design of the configuration of a firearm sight. This unique firearm sight design has been in continuous and substantially exclusive use beginning no later than June 2009.

3. The configuration of the firearm sight design of this application is a generally "L-shaped" configuration of a firearm sight with the vertical portion of the "L" facing toward the eye of the user and an asymmetrical from front to back housing over the sight opening. This design was chosen to be unique and distinctive from conventional tube and open firearm sight designs and to be readily identifiable as an EOTech firearm sight.

4. The unique and distinctive housing configuration design of the subject trademark application provides no utilitarian advantages to the user or any efficiency in manufacture or cost savings. Actually, this configuration is a more complex design than is required to house the mechanical and electronic internal components of a firearm sight and actually adds to the cost.

**Applicant's Patents**

5. The features and utility of the Applicant's firearm sights are the subject of numerous patents of Applicant, all of which relate to the mechanical, optical and holographic features of the firearm sights. The following United States patents of Applicant pertain to features and utilitarian components and systems of Applicant's firearm sights: U.S. Patent Nos. 5151800, 5483362, 5815936, 6490060, 7145703, 7225578, 7319557, D66256.

6. The highly distinctive design of the subject trademark application has never itself been the subject of an application for a utility or a design patent. None of the patents listed in the preceding paragraph includes a claim to the specific shape or configuration of the design of the subject application. None of the patents listed in the preceding paragraph includes any discussion or identification of a functional purpose of the shape, configuration or design of the subject trade mark application.

**Advertising Promotional and/or Explanatory Materials**

7. Since Applicant first sold firearm sights with the unique configuration and design of this application, Applicant has spent well over \$1.8 million promoting its unique L-shaped firearm sights.

8. EOTech has a website at [www.eotech-inc.com](http://www.eotech-inc.com) at which its firearm sights with the trade dress of the subject application are prominently displayed. This site has averaged 1.5 million hits per year.

### **Clones and Counterfeits**

9. Firearm sights bearing the trade dress design of the subject application have been manufactured and sold as clones by counterfeiters who slavishly copy such trade dress in a blatant attempt to deceive purchasers who immediately recognize the unique and distinctive design of the subject application as being an EOTech firearm sight. These counterfeit sights do not utilize the EOTech patented holographic technology. Based on this information and my understanding of the firearm sight market and my perception of consumers and military and law enforcement agencies, no doubt that such consumers, military, and law enforcement agencies recognize the unique trade dress of the housing of the subject application as distinctive and associated with its source, EOTech. The result is that firearm sights are purchased by consumers, military, and law enforcement agencies believing they are buying either a genuine EOTech firearm sight or a firearm sight the same as a genuine EOTech firearm sight based on their recognition of the distinctive trade dress of the firearm sight design, when in fact they are buying extremely poor quality and inferior counterfeit firearm sight. This poses significant risks to consumers. Military and law enforcement officers could be put in extreme danger if they are provided with such a counterfeit or clone firearm sight which copies the trade dress of the subject application.

### **Trade Shows**

10. EOTech attends roughly 50 trade or gun shows per year at which the subject configuration for firearm sights has been prominently displayed.

**Distribution and Sales**

11. EOTech has over 650 distributors that distribute its firearm sights.

12. EOTech has sold more than 1.1 million sights with the subject firearm sight design of the subject application or that of companion applications (which have a very similar design to the subject application).

I declare under penalty of perjury that the foregoing is true and correct.

\_\_\_\_\_  
Melissa Vasilevski

Dated: \_\_\_\_\_